No. 11957

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CALIFORNIA SHIP SERVICE COMPANY and FIREMAN'S FUND INSURANCE COMPANY,

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner, 13th Compensation District,

Appellee.

APPELLANTS' OPENING BRIEF.

LASHER B. GALLAGHER,
458 South Spring Street, Los Angeles 13.
Proctor for Appellants.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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Jurisdiction.

On the 6th day of December, 1945, one Robert Johnson, Jr., was in the employ of California Ship Service Company, a corporation, as a harbor worker and on said date was working as such harbor worker on navigable waters of the United States at Los Angeles Harbor, in the State of California, and on said date said Robert Johnson, Jr., sustained an injury which caused his death on the same day, to wit, December 6, 1945. Louise Johnson, Sr., was the mother of said Robert Johnson, Jr., and Robert Johnson, Sr., was the father of said Robert Johnson, Jr. Within the time allowed by law the said Louise Johnson, Sr., filed a claim for a death benefit award. After hear-

ings and investigation were conducted the Deputy Commissioner made a compensation order awarding a death benefit to Louise Johnson, Sr., and the six minor brothers and sisters of the deceased.

Appellants (libelants in the court below) within the time allowed by law filed a Libel for an Injunction in the United States District Court, Southern District of California, Central Division, contending that the award was not in accordance with law. Said Libel was filed in the court below pursuant to the Longshoremen's and Harbor Workers' Compensation Act which provides, in part, that:

> "If not in accordance with law, a compensation order may be suspended or set aside in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the federal district court for the judicial district in which the injury occurred. . . ." (Act of Mar. 4, 1927, c. 509, sec. 21, 44 Stat. 1436, as amended June 26, 1936, c. 804, 49 Stat. 1921, 33 U. S. C. A. 921.)

On March 15, 1948, the Honorable Charles C. Cavanah made and there was entered Findings of Fact, Conclusions of Law, and Judgment denying any relief and dismissing the action [Ap. 79-83].

Petition for Appeal was filed May 14, 1948 [Ap. 85]; Assignments of Error were filed May 14, 1948 [Ap. 86-89]; Bond for Costs on Appeal was approved and filed May 14, 1948 [Ap. 89]; Order Allowing Appeal was filed May 14, 1948 [Ap. 91-92]; Notice of Appeal was filed May 10, 1948, and copy thereof mailed to proctors for respondent within the time allowed by law [Ap. 92];

Praecipe for Apostles on Appeal was served and filed on May 17, 1948 [Ap. 95-96].

Jurisdiction of civil causes of admiralty and maritime jurisdiction is vested in the courts of the United States by Article III, Section 2, of the Constitution of the United States, to-wit: "The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction."

An appeal from a final decree in admiralty is authorized by Section 128a of the Judicial Code (43 Stat. at L. 936, 28 U. S. C. A., Section 225, which provides that a Circuit Court of Appeals shall have appellate jurisdiction to review final decisions).

Statement of the Case.

Robert Johnson, Jr., the deceased, was born on May 22, 1924 [Ap. 23]. On February 11, 1946, a Claim for Compensation (death benefit) was filed by Mrs. Louise Johnson of New Orleans, Louisiana, with the Deputy Commissioner at San Francisco. On February 13, 1946, a copy of said Claim was sent to the employer and insurance carrier by registered mail, for their Answer, and on February 20, 1946, an Answer was filed making a general denial of liability [Ap. 14]. The case was transferred by the Deputy Commissioner of the 13th Compensation District at San Francisco, California, with the approval of the United States Employees' Compensation Commission, to Deputy Commissioner Henderson at New Orleans, Louisiana [Ap. 13]. On July 16, 1946, the claimant appeared before Deputy Commissioner Henderson and was represented by Warren Woodville, Esq., her attorney. The employer and insurance carrier were represented at said hearing by Frank S. Normann [Ap. 18]. At said time the claimant, Louise Johnson, Sr., through her attor-

ney, and the employer and insurance carrier, through their attorney, stipulated to the following facts:

1. That on the 6th day of December, 1945, Robert Johnson, Jr., hereinafter called the decedent, was in the employ of California Ship Service Company, at Terminal Island, in the State of California, in the Thirteenth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Fireman's Fund Insurance Company; that on said day the decedent herein, while performing service for the employer upon the navigable waters of the United States, sustained accidental injury arising out of and in the course of his employment, and resulting in his disability while he was employed as a laborer on the S/S "California," said vessel being then afloat in the waters of the Pacific Ocean, at Berth 216, at Terminal Island, in the State of California, when, while engaged in ship repair operations on said vessel, he was descending a ladder into a tank and lost his balance and fell to deck of tank and sustained injuries which resulted in his death on December 6, 1946;

2. That written notice of said injury and death was not given within 30 days, but that the employer had immediate knowledge of said injury and death, and that the employer has not been prejudiced by such failure to give such written notice;

3. That the employer furnished the decedent with medical treatment, etc., in accordance with Section 7 (a) of the said Act;

4. That the average weekly wage of the decedent herein, at the time of his injury, amounted to the sum of $29.62 per week; that full wages were paid for the day of injury and death;

5. That the total amount of the funeral expenses for preparation and burial of the body of the decedent, which was handled by W. D. Fisher & Son, Inc., Undertakers, 4700 Avalon Blvd., Los Angeles, California, amounted to the sum of $511.75, of which amount nothing has been paid to the said undertaker by anyone, and another bill amounting to $192.88 for services rendered by Dennis Mortuary Service, 1940 Eagle Street, New Orleans, which bill has been paid in full by Mrs. Robert Johnson, Sr., the claimant in this case;

6. That the employer and insurance carrier herein have paid nothing as compensation (death benefits) to the claimant herein, and nothing on the burial expenses [Ap. 19-21].

The only witness who testified was Louise Johnson, Sr. The substance of her testimony, in the order in which she gave it, is as follows:

Direct Examination.

I am 42 years of age. I am the mother of Robert Johnson, Jr. Robert Johnson, Sr., is the father. Robert Johnson, Sr., and I were married December 23, 1919, in New Orleans, Louisiana. I and my husband live together. The deceased was born May 27, 1924 [Ap. 22, 23]. When my boy first went out there (the State of Washington or California) he sent me $30; then he started sending me $15 a week and after my girl got pregnant out there I didn't get any more.

(At this point Deputy Commissioner Henderson ruled as follows: "With reference to contributions by the decedent, we shall consider only one year prior to the decedent's death, coming back or going back one year to see what contributions might have been made, would seem a sufficiently long period to determine if there was any real dependency or not, so the period back to December 6, 1944, would be sufficient.") [Ap. 25, 26.]

I cannot remember when the deceased first went to California. Before he went to California he was at Bremerton, Washington. I know he sent me the $30 when he was in California. I don't know what month of the year he sent me the $30. I know the last time he sent me two $10 bills in November, 1945, to buy me some Venetian blinds. I just can't remember the last time before that when he sent me any money. I think it was either July or August, 1945, when he sent me $15. He sent me $15 in the month of June (1945) [Ap. 26-28].

My daughter went to California in December, 1944, and she got pregnant and he stopped sending money to me. I told him to take care of her; he was running with her all the time. The baby was born in October (1945).

I just can't remember how much I got in May, 1945 [Ap. 28].

I think I got $30 from him in April, 1945 [Ap. 29].

Between the first day of January, 1945, and the $30 he sent me for Easter he sent me money in between that time, from January to Easter. The first part of the month regular I got it then but after my daughter got pregnant, he had to pay for her. Before Easter, 1945, I used to get $15 from him right

along, twice a month, sometimes three times. I think I got $15 in March. I got $30 in March, 1945.

He was not sending money regularly in February, 1945. I don't remember if I got any money in February, 1945.

I do not recall if I got any money from the deceased in January, 1945. In December, 1944, I don't know how much money I got from him. That has been a long time. I can't remember that [Ap. 29-31].

I took care of my children with the money he sent me. The money from the decedent was spent on them. I used it to buy clothes and food and send them to school. I graduated one girl on the money he sent me. I used all of the money I told you about that the deceased sent to me for that purpose [Ap. 31, 32].

Cross-Examination.

My oldest daughter Louise is in California. That is the daughter who became pregnant. I don't know when she got pregnant but I know the baby was born October 19, 1945. I told Mr. Woodville that from the time my daughter became pregnant, until the time the baby was born, I did not receive any money from my son. During that time he was taking care of our daughter. She is not married. My son and my daughter were living together at the time he was killed. My daughter did not go to work after her baby was born. My son supported my daughter when she was pregnant and after the baby was born. October 19, 1945, he continued to support my daughter and her little baby [Ap. 33, 34].

My son did not support my daughter during all the time she was pregnant. This fellow she was living with left her after she was four or five months pregnant. She had a common law husband and he left her [Ap. 34, 35].

The common law husband left my daughter about five months before the baby was born. From the time my daughter's common law husband left her, up until the time my son was killed, my son was taking care of my daughter and her baby. My daughter had no other means of support. During that period of time my son did not send me any money at all [Ap. 35, 36].

It is not a fact that from the time that my daughter arrived in California, which was in the early part of December, 1944, that my son supported my daughter all during that time [Ap. 36].

While this common law husband of my daughter lived with her, he supported my daughter [Ap. 37].

When he left her, the dead boy had to support her or did support her; that is what I mean. The decedent in this case continued to support my daughter while she was pregnant until the baby was born on October 19, 1945. During the time that the dead boy supported my daughter, after her common law husband left her, the dead boy did not send me any money because he was using it for his own support and the support of my daughter. After the baby was born up until my son's death, he was supporting my daughter and her baby. The baby was born October 19, 1945, and my son was killed December 6, 1945. From October 19, 1945, when the baby was born, to the day the dead boy was killed, he supported the daughter and baby. During that time, namely, October 19, 1945, to the time of his death, the dead boy did not send me any money during that time because he was using his money for his own support and to support my daughter and her baby [Ap. 38, 39].

From the date the baby was born that shows as proof that my daughter became pregnant right after she got out to California [Ap. 40].

After I learned that my daughter was pregnant, which was the early part of 1945, my son supported my daughter until the baby was born. The dead boy did not send me any money from the time he started taking care of my daughter until his death. From the time my daughter got to California until she took up with this common law husband, my dead boy did support my daughter and from the time she took up with the common law husband until he left her, the common law husband supported her. I don't know how long that was. But whatever time it was, one to five months, during the time the common law husband was supporting my daughter my deceased son sent me money during that time and after the common law husband left my daughter, the dead boy had to go back to supporting my daughter and from that time on didn't send me any money. The dead boy, the deceased in this case, didn't send me any money after my daughter's common law husband left her. In November (1945) he sent me two $10 bills to get some Venetian blinds. That was all of the money he sent me from the time the common law husband left my daughter until the boy's death—$20 [Ap. 44-46].

"Q. (By Deputy Commissioner Henderson): Listen carefully: You stated a moment ago in March, 1945, the decedent—the dead boy, sent you $15 two different times in March, 1945. Now if that is true, then your daughter's common law husband was living with her then, because you have already stated when the common law husband was with your daughter, he supported her; so I take it from what

you stated, that the common law husband was still living with your daughter in March, 1945. Then you stated in April, 1945, the dead boy sent you $30? A. Yes.

Q. So if that is true, Mrs. Johnson, the common law husband was with your dapghter in April, 1945, and in May you said you don't know if the dead boy sent you any money or not, so in June you stated the dead boy sent you $15, and July or August he sent you $15, and November, $20. So that would seem to indicate that your daughter's common law husband probably lived with her and left her about May, 1945. A. I don't know. I know he left her.

Q. (Continuing): Because if your statement is true that while the common law husband was with your daughter, the dead boy sent you money, and when the common law husband was not with your daughter, the dead boy did not send you any money; so it would indicate the common law husband left your daughter in about May, because you can't remember if your son sent you any money in May or not, and it would indicate the common law husband may or may not have been with your daughter in June or July, because your son sent you money; because you earlier said your son did not send you any money after your daughter's common law husband left her. So if that is true, do you still say the dead boy sent you $15 in June, 1945, and $15 in July or August, 1945? A. *I don't know.*

Q. That is what you told us. But do you still say that is correct? Is that correct to the best of your knowledge? A. That is the best of my knowledge. I am wool-gathered now. I know he sent me money.

Q. We are talking about June, July and August. Do you think that is right, that he sent you $15 in

June, which might mean the common law husband was living with your daughter, and he sent you $15 in July or August, and that might indicate the common law husband was still living with your daughter. Now do you say yet, after thinking it over, that you think or say that the dead boy sent you $15 in June, 1945, and $15 in July or August, 1945, or now do you think that might be wrong? A. *I can't say.*" [Ap. 47-49.]

My son went to the West Coast in the early part of 1944.

"Q. (By Mr. Normann): When you told the Commissioner he sent you money in June and July and August, you are not (evidently meaning 'now') referring to the year 1944 and not the year 1945, because a few moments ago you testified while your daughter was pregnant and her common law husband left her, your son was not sending you money, but supported your daughter? Answer yes or no. A. I don't know." [Ap. 49.]

Redirect Examination.

My daughter must have become pregnant on or about the 19th day of January, 1945 [Ap. 51]. I have testified that he sent me that money ($30) for Easter in the month of April [Ap. 51, 52]. When I testified that my son didn't send me any money after my daughter's common law husband left her, I mean he did not send me money regularly. Before my daughter went out there my son sent me money regularly every week. He didn't send me money regularly after the boy left the girl. But he did send me this money that I testified about [Ap. 51, 52].

Recross-Examination.

My husband was working during the time the dead boy was sending me money. At that time my husband was making $28 a week. There were the same six children that had to be supported at that time and myself and my husband. There were eight in my family. I paid $12 a month rent and out of my husband's income the whole family had to be supported. My husband's income was not sufficient to meet my living expenses at that time. That was the cause of the child (the deceased son) going to Washington to make more money and help support the family. He worked and helped take care of the family [Ap. 53-55].

The money he sent me after he went to Washington State was to help support me and my children and his father because the father's income was not enough [Ap. 55].

From the foregoing evidence it appears, without conflict that the deceased became an adult person of 21 years of age on May 27, 1945. Between May 27, 1945 and December 6, 1945, the date of the death, the most that can be squeezed out of the testimony with reference to contributions is that the deceased sent $15 in June, 1945, $15 in July or August, 1945 and the sum of $20 as a gift to buy Venetian blinds in November of 1945. In other words, from the time the deceased was in control of his earnings after he became 21 years of age he sent the total sum of $50. If we consider the testimony with reference to the entire year from December, 1944 to December, 1945, the most that can be squeezed out of the evidence is as follows: Nothing was sent in December, 1944 or January or February, 1945. In March, 1945 $30 was

sent; in April, 1945 $30 was sent as an Easter gift; in June $15 was sent; in July or August $15 was sent; and in November, 1945, $20 was sent as a gift to purchase Venetian blinds. Thus $50 of the total sum during the whole year immediately preceding the death was made up of two gifts, one in the sum of $30 and the other in the sum of $20, leaving $60 for the entire year which might be construed as contributions toward support of the entire family.

Based on the foregoing evidence, Deputy Commissioner Pillsbury found, contrary to the stipulation of the parties "that the average weekly wage of the decedent herein at the time of his injury, amounted to the sum of $29.62 per week" [Ap. 20] that the average weekly earnings of the deceased at the time of his injury exceeded $37.50 [Ap. 6] and also found that the claimant and the minor brothers and sisters were totally dependent upon the deceased and made a death benefit award in a sum which would be fixed as a maximum under the law in the event of total dependency [Ap. 6, 7], which award will ultimately require appellants to pay out the sum of $7500.00.

In the Libel for an Injunction, the appellants alleged as follows:

> "The award is not in accordance with law for the following reasons:
>
> 1. There is no evidence to support the finding that the average weekly earnings of Robert Johnson, Jr., at the time of his injury exceeded $37.50. and said finding is directly contrary to the stipulation of the parties that the average weekly wage of the decedent at the time of his injury amounted to the sum of $29.62. (Exhibit 'A,' pg. ....., lines .....)

2. There is no evidence to show that there was no surviving wife or child of Robert Johnson, Jr.

3. There is no evidence showing that Louise Johnson, Sr., was dependent upon the deceased Robert Johnson, Jr., at the time of the injury which caused the death of said Robert Johnson, Jr.

4. There is no evidence showing that the minor brothers or sisters were or any thereof was dependent upon the deceased Robert Johnson, Jr., at the time of the injury which caused the death of the said Robert Johnson, Jr.

5. No claim for a death benefit was at any time filed by any person excepting Louise Johnson, Sr., and the deputy commissioner had no power or jurisdiction to make or order any award in favor of any minor brother or sister of Robert Johnson, Jr.

6. The award does not provide that payments are to be continued only during any dependency of Louise Johnson, Sr.

7. The award does not provide that payments are to be continued only during any dependency of the minor brothers and sisters of Robert Johnson, Jr.

8. There are no findings as to why or how Louise Johnson, Sr., was a dependent of Robert Johnson Jr.

9. There are no findings with reference to whether or not Louise Johnson, Sr., was dependent upon Robert Johnson, Jr., at the time of the injury which caused the death of said Robert Johnson, Jr.

10. There are no findings with reference to whether or not the minor brothers and sisters of the deceased were dependent upon the deceased at the time of the injury which caused the death of said Robert Johnson, Jr.

11. The award does not provide that payments are to be continued only during dependency.

12. There is no finding that Robert Johnson, Jr., left no surviving wife or child.

13. There is no substantial evidence to support the findings and award, or either thereof." [Article VIII, Ap. 10-11.]

The Honorable Lower Court failed to rule on the allegations in the Libel which raised questions of law and instead tried the case as though the District Court had the authority to try the case *de novo*. The District Court made findings of fact which followed, almost verbatim, the findings of fact which had been made by appellee.

As conclusions of law the District Court held that the findings of fact and award and the compensation order are in accocrdance with law "for the reason that said findings are supported by substantial evidence introduced in said proceedings before said commissioner" and that the libelants are not entitled to a mandatory or other injunction [Ap. 79-83].

The appellants filed objections to the proposed findings of fact and conclusions of law, in substance setting out the following points: (1) There was no trial *de novo;* (2) That the only questions submitted to the District Court were questions of law; and (3) That the sole province of the District Court, in the absence of a trial *de novo* of jurisdictional or fundamental facts, is to enjoin the award, or dismiss the libel [Ap. 76, 77].

The District Court "found" that the average weekly earnings of the employee at the time of his injury exceeded $37.50 [Ap. 80]. This finding was made in spite of the Answer filed by appellee in which it was averred that "the findings of fact in the compensation order com-

plained of *except the finding that the deceased's average weekly wage exceeded $37.50,* are supported by evidence" [Ap. 68-69].

In addition to this the appellee prayed that the case be remanded to the respondent Pillsbury "to make a new finding with reference to the deceased's average weekly wage at the time of his injury, and to adjust the amounts of the awards accordingly" [Ap. 69].

It was thus conceded that the award and the amount thereof were not in accordance with law.

Summary of Argument.

Up until the 27th of May, 1945, under the common law, and the statutes of Louisiana and California, the earnings of the deceased were not his property but belonged as a matter of law to his father. Therefore any money which might have been sent to his mother prior to that date was not what could be called a voluntary contribution. From and after the date when the deceased became 21 years of age, he was a resident of the State of California and the evidence shows that after that date the deceased sent not to exceed $50, $20 of which was a gift to buy Venetian blinds and which was not used for the support of the family. Appellants contend that the Deputy Commissioner and the District Court approached and decided the case on the theory that the compensation benefits provided by the Longshoremen's and Harbor Workers' Compensation Act are the same as life insurance and lawfully permit the entry of a death benefit compensation order in the maximum amount of $7500 payable at the rate of $25 per week, regardless of whether or not the claimant is totally or partially dependent upon the deceased. Appellants contend that such compensation order is not in accordance with law. The obvious and

basic purpose underlying the theory of workmen's compensation is that an award relieve a properly included beneficiary of the particular economic impact suffered by him or her as a result of the workman's death. Certainly a claimant who might be partially dependent upon a deceased workman was not intended by the Congress to receive exactly the same benefit as one who was totally dependent upon the workman.

Appellants also contend that the total amount of an award in favor of a parent or a minor brother or sister of a deceased workman cannot exceed 25 per centum of the average wages of the deceased, in so far as the parent is concerned, and 15 per centum of the average wages of the deceased for each minor brother and sister and that the percentages relate to the wages earned by the deceased during the time prior to his death when such persons were actually dependent upon the deceased for support.

Appellants also contend that the award is not in accordance with law because there is no evidence showing any dependency of any kind or character as of the time of the injury which caused the death on December 6, 1945.

Appellants also contend that they were entitled to specific rulings with reference to each allegation in Article VIII of the Libel.

The questions involved are raised by the Assignments of Error [Ap. 86-89] and the adopting by appellants "as their points on appeal of the Assignments of Error appearing in the transcript of the record in this case" [Ap. 121].

Specification of Errors Relied Upon.

Appellants rely upon Assignments of Error I, II, III, IV, VI, VII, VIII and IX [Ap. 86-89].

ARGUMENT.

POINT I.

The District Court Erred in Failing to Set Aside the Compensation Order Upon the Ground That the Same Is Not in Accordance With Law.

The District Court Erred in Failing to Find, Decide, Conclude or Rule, One Way or the Other, Upon the Contention of Libelants That There Was No Substantial Evidence Upon Which the Deputy Commissioner Could Find That Any Claimant Was Dependent, Totally or Partially, Upon the Deceased at the Time of the Injury Which Caused His Death.

The District Court Erred in Refusing to Find, Decide, Conclude or Rule, That There Is No Substantial Evidence in the Record of the Proceedings Before the Deputy Commissioner to Support Any Finding, Express or Implied, That Minor Brothers or Sisters of the Deceased Were or Either of Them Was Dependent Upon the Deceased at the Time of the Injury Which Caused His Death.

The District Court Erred in Finding That the Average Weekly Earnings of the Deceased Exceeded $37.50 Per Week in the Face of a Definite and Specific Stipulation Entered Into by the Parties Involved in the Proceedings Before the Deputy Commissioner That the Average Weekly Wage of the Deceased Was the Sum of $29.62.

This point involves a consideration of Assignments of Error I, VI, VII and VIII, set forth above and appearing in the Apostles at pages 86 and 88.

As appellants have already pointed out, the record as made before the deputy commissioner at the hearing in

New Orleans contains a stipulation that the average weekly wage of the decedent at the time of his injury, amounted to $29.62 per week. The finding made by the Deputy Commissioner is that the decedent's average weekly wage exceeded $37.50. The amount of the award was fixed at 66⅔% of $37.50. This was clearly an arbitrary finding and has no support whatever in the evidence. Upon this ground alone appellants were entitled to have the compensation order enjoined.

In addition to this the Court made an independent finding, contrary to the stipulated fact in the record, that the average weekly earnings of the employee at the time of his injury exceeded $37.50. This finding is clearly erroneous for the same reason that the finding made by the Deputy Commissioner was erroneous.

Appellants also contend that there is no evidence in the record which would support a finding that the mother and/or minor brothers and sisters of the decedent were, or that either thereof was, dependent upon the decedent at the time of the injury which caused his death, which was December 6, 1945. Section 909, Subdivision (f) of Title 33, U. S. C. A., provides that "all questions of dependency shall be determined as of the time of the injury." We have shown that in November, 1945, a gift of $20 was made by the decedent to his mother for the purpose of purchasing Venetian blinds. Certainly this sum cannot be used as support for a finding that this gift was used for the purpose of housing, feeding, clothing or educating any of the minor brothers or sisters or for the purpose of supporting the mother. This item cannot be regarded as a necessity of life. The last payment which might have been used for the purpose of supporting anybody was the contribution of $15 in July or August,

1945, which was over three months preceding the death of Robert Johnson, Jr. This seems to appellants to be directly in the face of the statute and conclusively establishes a lack of proof of dependency as of the time of the injury. There is nothing ambiguous about the provision of the statute which states that "all questions of dependency shall be determined as of the time of the injury." It is interesting to note that Deputy Commissioner Pillsbury did not find that any of the persons for whose benefit the award was made was dependent upon the decedent at the time of the injury. The finding "that the employee left surviving him and dependent in fact upon him for support his mother, Louise Johnson, Sr., born December 28, 1905, and an adult sister, Louise Johnson, born December 11, 1922, a child of said Louise Johnson named Joseph Charles Forest Johnson, born October 19, 1945, and the following minor brothers and sisters: Lucille Idel Johnson, born February 29, 1929; Edwin Johnson, born July 22, 1930; Hilda Mae Johnson, born March 30, 1932; Harold Johnson, born April 4, 1934; Walter Johnson, born June 22, 1936, and Romalis Johnson, born November 20, 1940" [Ap. 80, 81], is not a finding of dependency *as of December 6, 1945.* Obviously no finding could have been made of even a partial dependency as of December 6, 1945.

Appellants again direct the attention of the Court to the testimony with reference to claimed contributions made regularly prior to December, 1944, and during the minority of Robert Johnson, Jr. In the case of *Standard Dredging Corp. v. Henderson,* 150 F. 2d 78, 80, the Court says:

> "Our greatest trouble is with the question of dependency of the father and mother. The deputy commissioner did not discuss it in his findings, but found

generally that they were dependent. The district judge said simply that he thought partial dependence was shown. The deputy commissioner's brief here merely says that there was testimony which if believed showed the deceased sent money home to his parents and contributed to their support. But more than this is necessary to make a case of dependence. Regular contributions voluntarily made tend to show a need for them, but in this case Johnson was a minor of 18 years, hired out by his father, and his earnings above his necessary support belonged to his parents irrespective of their condition of health or finances. That he sent them money proves nothing as to their need." (150 F. 2d, at 80.)

At page 81, the Court also says:

"The death benefits under the Act are not life insurance to be paid to some one in every case, but arise only when the relationships and circumstances exist which are stated in the Act." (150 F. 2d, at 81.)

No claim was filed with the Deputy Commissioner by the minor brothers and sisters of the deceased. The record shows, as hereinabove set out in the Statement of the Case, that only the mother filed a claim. The minor brothers and sisters were not represented at the hearing held in New Orleans, Louisiana, and the only issue with reference to any question of dependency related to whether or not the mother was dependent upon Robert Johnson, Jr., at the time of his injury. At the time of the oral proceedings, Mrs. Johnson's counsel asked her what she did with the money sent to her and she said she took care of her children with it. The next question related to the number of children. Counsel for appellants objected to this upon the ground that "there is no claim here for any

children". Counsel for Mrs. Johnson, who did not at that time represent the children and when no attempt was made to file any claim on behalf of the children, stated that, "If it please the Court, the number of children she had in her family would affect the capacity of what money her husband gave toward her support, and the same people she would have to support herself, would add to the amount of her dependence on the decedent." The Commissioner overruled the objection evidently on the theory that the evidence was admissible not for the purpose of proving dependency on the part of the minor brothers and sisters but for the purpose of proving dependency on the part of the claimant, Mrs. Johnson [Ap. 32].

Due process of law requires the making of a claim by any person who contends a lawful right to a death benefit award. Such claim must be filed prior to the time of any hearing so that the employer and his insurance carrier may have an opportunity to dispute the issue and offer evidence with reference thereto. No such opportunity was accorded appellants in the case at bar.

Section 19 of the Act (33 U. S. C. A., 919) provides that subject to the limitation of time within which a claim for compensation is barred, a claim for compensation may be filed with the Deputy Commissioner and that "the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim." The clear meaning of this language is that the Deputy Commissioner has no power or authority to hear or determine any question until a claim for compensation is filed with him by the particular person claiming the right to compensation.

Due process of law is provided for in said Section 19 (b) as follows:

> "Within 10 days after such claim is filed the deputy commissioner, in accordance with regulations prescribed by the Administrator, shall notify the employer . . ., that a claim has been filed." (33 U. S. C. A., 919 (b).)

> "The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect to the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least 10 days notice of such hearing served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail, and shall within 20 days after such hearing is had, by order, reject the claim or make an order in respect of the claim. If no hearing is ordered within 20 days after notice is given as provided in subdivision (b) the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim." (33 U. S. C. A., 919 (c).)

Section 19(d) of the Act (33 U. S. C. A., 919 (d)) provides that the employer may present evidence in respect of such claim and may be represented by any person authorized in writing for such purpose.

The Act does not vest in the Deputy Commissioner any authority to add parties to a claim previously filed.

The compensation order is not in accordance with law in so far as the minors are concerned because they did not have a claim on file prior to the hearing. There is nothing in the record to show the existence of any power on the part of the appellee to make an award to the minors.

POINT II.

The District Court Erred in Deciding, Ruling and Concluding That the Surviving Mother as a Parent of the Deceased Was Entitled to 25 Per Centum of "Average Weekly Earnings of the Employee, With a Base Rate of $37.50," and That the Minor Brothers and Sisters Are Entitled in Addition to 15 Per Centum Per Week of Said Sum of $37.50, and the Said District Court Erred in Its Construction of the Longshoremen's and Harbor Workers' Compensation Act in This Respect Regardless of Whether or Not the Said Persons Were or Either of Them Was Dependent Upon the Deceased at the Time of the Injury Which Caused His Death.

The District Court Erred in Deciding, Ruling and Concluding That the Longshoremen's and Harbor Workers' Compensation Act Entitles a Surviving Mother and Surviving Minor Brothers and Sisters, or Either of Said Classes of Persons, to a Compensation Order Which Will Result in the Payment to Both or Either of Said Classes the Maximum Sum of $7500.00, Regardless of Whether or Not Said Persons Were Totally or Partially Dependent Upon the Deceased at the Time of the Injury Which Caused His Death and Regardless of the Period of Time Preceding the Injury Causing the Death During Which Such Persons Were or Either of Them Was Actually Dependent Upon Such Employee.

The District Court Erred in Deciding, Ruling and Concluding That Each and Every Class of Persons, Regardless of Relationship and Regardless of Legal Duty Existing on the Part of the Employee to Support the Claimant of a Death Benefit, Is Entitled to Collect the Maximum Death

Benefit of $7500.00 From the Employer or the Employer's Insurance Carrier, and in Deciding and Concluding That Totally or Partially Dependent Surviving Parents and Minor Brothers and Sisters Are in Exactly the Same Class and Entitled to Exactly the Same Maximum Award as a Surviving Wife or Surviving Natural and Totally Dependent Children of the Deceased.

This point involves a consideration of Assignments of Error, II, III and IV, set forth above and appearing in the Apostles at pages 86 and 87.

In the argument under Point I, appellants have shown that there is no evidence showing that any of the persons in whose favor the death benefit award was made was dependent upon the deceased at the time of the injury which caused his death.

A reasonable construction of the Longshoremen's and Harbor Workers' Compensation Act with reference to death benefits will clearly show that the award in the case at bar is not in accordance with law. Section 9 of the Act (33 U. S. C. A., 909) provides that "if there be a surviving wife or dependent husband and no child of the deceased" there shall be payable

> "to such wife or dependent husband 35 per centum of the average wages of the deceased, during *widowhood*, or dependent *widowhood* with two years compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of 10 per centum of such wages for each such child; in case of the death of remarriage of such surviving wife or dependent husband, any surviving child of the deceased employee shall have his compensation increased to 15 per centum of such

wages: *Provided,* that the total amount payable shall in no case exceed 66⅔ per centum of such wages."

It will be seen from the foregoing language that a surviving wife or natural child of a deceased is regarded as entitled to a death benefit award regardless of the question of actual dependency for the reason that the law places upon the hsuband and father the obligation to take care of the total needs of a wife or child.

The section then provides that if there be no surviving wife or dependent husband or child then for the support of

"brothers and sisters, if dependent upon the deceased at the time of the injury, 15 per centum of such wages for the support of each such person and for the support of each parent, . . ., of the deceased if dependent upon him at the time of the injury, 25 per centum of such wages during such dependency."

Appellants contend that there is no reasonable basis which would support an interpretation of the Act leading to a conclusion that the Congress intended to permit an award which will amount to the maximum payment of $7500.00 in every case regardless of a consideration of the extent to which the deceased contributed to the support of the claimant asserting a right to a death benefit. For the purpose of illustration, appellants will give the following examples:

1. A longshoreman who is married and living with his wife is the father of six minor children. The wife and children have been totally dependent upon and supported by the longshoreman at all times since the marriage and the

respective births of the children. At all times during the marriage the particular longshoreman has earned wages averaging $75.00 per week and all of the earnings of the longshoreman have been devoted exclusively to the support and maintenance of himself and his family and the education of his children. In such case the award would provide for a weekly payment of 35 per centum of the average wages of the deceased to the surviving wife during widowhood or dependent widowhood with two years compensation in one sum upon remarriage and 10 per centum of such average wages for each such child. Thus the total weekly payment would be $25.00 with a limit of $7500.00.

2. An adult longshoreman for ten years preceding his death has been maintaining a home and living with his mother and six minor brothers and sisters each of whom, during all of said time, has been totally dependent upon and supported by such longshoreman. Said longshoreman has also earned during said entire period the average sum of $75.00 per week and has devoted all of it to the support of himself, his mother and his minor brothers and sisters. In such case the award would be 15 per centum of $37.50 per week for the support of each such minor brother and sister and for the support of the mother 25 per centum of such wages and the weekly benefit in such case would be limited to a total sum of $25.00 per week.

3. An adult longshoreman, who is single, has also earned the sum of $75.00 per week. During the year immediately preceding his death he has sent to his mother contributions toward her support and the support of six minor brothers and sisters, regularly, the sum of $2.00 per week, making a total contribution for the year in the sum of $104.00.

It is not reasonable to assume that the Congress intended to impose upon industry the burden of paying to the claimants in the third illustration the same weekly benefit as it provided, or intended to provide, for the claimants in the first and second illustrations.

Appellants contend that while the Congress has the legislative power to impose liability without fault by way of workmen's compensation and death benefit, the statute would be in contravention of that portion of the Fifth Amendment to the Constitution of the United States providing that no person shall be deprived of his property without due process of law, if it were construed to mean that an actual voluntary contribution of not in excess of one hundred dollars in one year toward the support of a mother and six minor brothers and sisters entitles such persons to recover seventy-five times that amount by way of a death benefit award. Such construction of the statute would do violence to the entire theory of the Act.

With reference to this subject, Section 8 of the Act (33 U. S. C. A., 908) provides for the payment of compensation for disability resulting from industrial injury. A clear distinction is made between the amounts of disability awards which may be made by the Deputy Commissioner with reference to permanent total disability, temporary total disability and permanent partial disability. The purpose of Congress is conclusively shown by this method of providing compensation for disability resulting from bodily injury. In other words, the injured employee who suffers

the loss of a thumb is not entitled to as much as one who has lost an arm or a leg.

The extent of the economic impact upon the particular claimant is the basic limit of the amount to which such claimant might be entitled. The Deputy Commissioner and the Honorable trial Judge concluded that the sum of $7500.00 is to be recovered by all claimants in all death cases regardless of whether or not the claimants are totally or partially dependent upon the longshoreman who has lost his life in an industrial accident. The fact that the law as it existed at all times relevant to the case at bar provides that "the total compensation payable under this chapter for injury or death shall in no event exceed the sum of $7500.00 (Section 9 (m); 33 U. S. C. A., 914 (m)), does not mean that the total compensation payable under the chapter for death shall in every case amount to the sum of $7500.00.

In subdivision (d) of Section 9 of the Act (33 U. S. C. A., 909 (d)), it is provided, as appellants read the language therein contained, that there is a clear distinction between the amount which may be awarded to a partially dependent parent or a partially dependent minor brother or sister and the amount which is payable to a surviving wife and natural child of a deceased longshoreman. Keeping in mind that all questions of dependency shall be determined as of the time of the injury, it seems clear that the dependency referred to in the section is dependency prior to the death of the longshoreman. It is

obvious that the deceased in the case at bar could not earn any wages of any kind after his death. It is difficult to understand how any person could be dependent upon another person after the death of such last mentioned person. Appellants contend that the only reasonable construction of said Section 9 of the Act as applicable to the case at bar would be one which restricts the total award in favor of the mother to 25 per centum of the average wages earned by Robert Johnson, Jr., during the time she is able to prove that she was actually dependent upon him if such dependency existed at the time of the injury and a limit of 15 per centum of such average wages earned by Robert Johnson, Jr., during the time the minor brothers and sisters are able to prove that they were actually deepndent upon him if such dependency existed at the time of the injury.

In the case at bar the Robert Johnson, Sr., was at all times working and his earnings of at least $28.00 per week were used to support the family. If the total amount of $60.00 sent to the mother (aside from the Easter gift of $30.00 and the $20.00 gift for Venetian blinds in November) is compared with the total earnings of the father, the most that could be said is that the dependency was very slight. The father's contribution for a year would be $1456.00. Thus the percentage of partial dependency would be slightly in excess of four per centum. Under such circumstances the award of a maximum benefit of $25.00 a week is clearly arbitrary and not in accordance with law.

POINT III.

The District Court Erred in Making Findings of Fact Upon the Theory That the Said District Court Had Tried the Issues De Novo When the Sole and Only Providence of Said District Court Was to Determine Whether the Compensation Order Was or Was Not in Accordance With the Law.

This point involves a consideration of Assignment of Error IX, set forth above and is found in the Apostles at pages 88 and 89.

The law, as applicable to the issues in this case, is clearly settled and pursuant thereto the sole and only power of the District Court was to examine the evidence and findings contained in the record of the proceedings before the Deputy Commissioner and determine therefrom whether, as a matter of law, the award was or was not in accordance with law.

The issues of law were clearly raised by Article VIII of the Libel [Ap. 10, 11]. As appellants understand the law, the District Court in matters of this kind, where there are no fundamental or jurisdictional issues of fact involved, is in the same position as an appellate court on an appeal from a judgment at law. Therefore the opinion or judgment of the District Court should, in all probability, be cast in the form of an opinion or conclusions of law answering in some definite manner the contentions as asserted in the Libel. Appellants understand that a Deputy Commissioner's findings of fact, if supported by evidence, may not be disturbed by a reviewing court (*Cardillo v. Liberty Mutual Co.*, 330 U. S. 469, 477, 478,

67 S. Ct. 801, 91 L. Ed. 1028; *Delta Stevedoring Co. v. Henderson,* 168 F. (2d) 872), and make no contrary contention.

The learned trial Judge did not perform the required functions of the District Court in matters of this kind. The fact that the trial court made findings of fact, and drew therefrom conclusions of law clearly indicates that he proceeded on the theory that there was a trial *de novo* with reference to issues of fact. Appellants brought the point directly to the attention of the trial court by filing objections therein to the proposed findings of fact and conclusions of law [Ap. 76-78]. Article VIII of the Libel [Ap. 10, 11], pointed out appellants' contentions with reference to the lack of evidence to support the essential findings of the Deputy Commissioner. The failure of the Deputy Commissioner to make other required findings was pointed out as follows:

> "The award does not provide that payments are to be continued only during any dependency of Louise Johnson, Sr.
>
> "The award does not provide that payments are to be continued only during any dependency of the minor brothers and sisters of Robert Johnson, Jr.
>
> "There are no findings as to why or how Louise Johnson, Sr., was a dependent of Robert Johnson, Jr.
>
> "The award does not provide that payments are to be continued only during dependency." [Subdivisions 6, 7, 8, and 11, Ap. 11.]

In the case of *Standard Dredging Corp. v. Henderson,* 150 F. (2d) 78, the Deputy Commissioner did exactly the same thing which the Deputy Commissioner did in

the case at bar with reference to findings on the question of dependency. In that case the Court said:

> "The deputy commissioner did not discuss it (the dependency of the father and mother) in his findings, but found generally that they were dependent." (150 F. (2d) at page 80.)

In the case at bar the same type of general finding was made by the Deputy Commissioner. He does not find that any of the persons involved was dependent upon Robert Johnson, Jr. at the time of the injury on December 6, 1945 [Ap. 6]. Neither is there any limitation in the award with reference to the cessation of the award.

With respect to these matters, the Court in the case of *Standard Dredging Corp. v. Henderson,* 150 F. (2d) at page 82, states as follows:

> "Cessation of dependency can probably be enquired into by resort to the procedure provided in Sect. 14 (h) of the Act, 33 U. S. C. A. §914 (h), or Sect. 22 of the Act, 33 U. S. C. A. §922. But we are of opinion that regularity requires that the award follow the statute in awarding compensation 'during such dependency.'
>
> "Because the record shows no findings as to why or how the parents were dependent, and whether or not the dependency found to exist at death continued beyond the time of the award, and because the award does not provide that payments are to be continued only during the dependency, we hold that the award ought to be set aside, but without prejudice to a further hearing and the making of such findings and such an award as may appear proper." (150 F. (2d) at page 82.)

For the same reasons as are assigned by the Court in the case last cited, it is clear that the trial Judge should have enjoined the enforcement of the award and should have directly passed upon the questions of law asserted in Article VIII of the Libel.

Conclusion.

It is respectfully contended that the decree dismissing the Libel should be reversed and that the case should be remanded to the District Court for a proper disposition of the issues of law; or in lieu thereof, that this Honorable Court, in the exercise of its powers in an Admiralty case, enter the final decree which should have been entered by the Honorable District Court.

Respectfully submitted,

LASHER B. GALLAGHER,
Proctor for Appellants.